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No. 398

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA,
Petitioner
V.
STATE OF ALABAMA, et al.

Reply To
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MacDONALD GALLION
Attorney General
State of Alabama

NICHOLAS S. HARE
Assistant Attorney General
State of Alabama

GORDON MADISON
Assistant Attorney General
State of Alabama

STATE CAPITOL
MONTGOMERY, ALABAMA

FOR ALL DEFENDANTS

L. K. (SNAG) ANDREWS
UNION SPRINGS, ALABAMA

Of Counsel for Defendants
GRADY ROGERS and
E. P. LIVINGSTON

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IN THE

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OCTOBER TERM, 1959

NO.

UNITED STATES OF AMERICA, Petitioner

v.

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BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Middle District of Alabama was adverse to Petitioner, and Petitioner appealed therefrom to the Court of Appeals. That opinion is reported at 171 F. Supp. 720 and is set out as Appendix A to the Government's petition. The opinion of the Court of Appeals was also adverse to Petitioner. That opinion is reported at 267 F. 2d. 808 and is set out as Appendix B to the Petition.

STATEMENT OF THE CASE

The case is succinctly stated by the pleadings and sufficiently summarized in the opinions below.

However, with the exception of the few additions here noted, Defendants accept the general statement

of the case as set out by Appellant. That statement should be amplified to show the following:

Defandants Rogers and Livingston resigned and gave written notices of their resignations to the appointing authorities **approximately two months before this case was filed.** Their resignations were absolute and unconditional and were made in good faith. It was shown that neither intends to serve again as a member of the Board of Registrars; that their resignations were accepted by the appointing board, and that both hold other public offices, each having qualified and begun serving in his public office (R. 73-78; see also Opinion of Court of Appeals at page 33 of Petition).

The defendant "Board of Registrars of Macon County, Alabama," is not before the Court and never has been as it was never served (even if it be a suable, legal entity and both lower courts held that it was not such an entity under Alabama law). The only purported service was upon a person who was not then a registrar, nor an agent, of the Board (R. 53).

At page 4 of the Petition, it is stated that the amended complaint avers that the State of Alabama, through its agents, officials, and agencies, had engaged in discriminatory and unlawful practices. Attention is called to further allegations of the complaint which set out certain applicable laws of the State of Alabama specifically. (Of course, these and other applicable State laws are within the judicial knowledge of the Court anyway.) The Alabama law specifically forbids discrimination between applicants for voting. See Section 31 of Title 17, Code of Alabama, referred to in Petitioner's complaint at page 2(a) of the appendix to the complaint (R. 10). The complaint shows on

its face by this specific allegation that if there be any discrimination against any applicant for registration, such discrimination is unauthorized under the laws of the State of Alabama and is completely ultra vires, being merely the individual action of some person or officer and not the act of the State; such action as complained of cannot be the action of an agent acting within the line and scope of his authority for and on behalf of the State of Alabama.

QUESTIONS PRESENTED

The question as stated by petitioner is not squarely presented by the case at bar. The question of whether a **State** (as distinguished from the individual state officials who may be committing the alleged wrong) can be directly enjoined in a suit brought by the Attorney General under the Civil Rights Act of 1957 is of great importance, of course. However, this case is hardly the appropriate case to present this question or, indeed, the real basic, primary, and fundamental question, viz: **Is the Civil Rights Act of 1957 Constitutional?** The constitutionality of the Act was challenged by defendants below, but both lower courts decided the cause without considering that basic question (District Court Opinion, App. A, top of page 28 of Petition).

Moreover, the question, as stated by Petitioner (see page 5 of Petition), arises from the unique or unusual situation peculiar to this case only; a situation which will limit the general or universal considerations. As expressed by Petitioner at Page 5 of the Petition, the question in the instant case is whether the Civil Rights Act of 1957 authorizes injunctive relief directly against a State where: (1) The individual board members had effectively resigned prior to the

institution of this action, and (2) the Board of Registrars is not a legal or suable entity. The two lower courts have found as a mixed question of fact and local Alabama law that the individual registrars had in fact effectively resigned prior to the institution of the action and that in this instance the Board of Registrars was not a suable entity.

ARGUMENT

The carefully prepared opinions of the Trial Court and of the Circuit Court of Appeals amply show the correctness of the judgment entered. Not only is the legal question presented by this case too limited to be of general importance, but it is clear from the opinions of these two courts below that their decisions are sound and just. No corrective action by this Court is required.

Neither the Trial Court nor the Court of Appeals found it necessary to consider the grave question of the constitutionality of the Civil Rights Act. This fundamental legal proposition has been raised directly in at least one case already decided by a district court, and counsel for defendants understand those cases are pending for review by this Court. Those cases should be decided instead of, or at least before, this particular case or any case so limited as in this case.

Registration is conducted by individual officials. If they are guilty of discrimination, the action can and should be brought against those individuals. This gives ample remedy to petitioner and refutes any idea of urgency or necessity for this procedure and also demonstrates the impropriety or lack of necessity for suing a State in its sovereign capacity, particularly where

the State laws directly forbid the discrimination complained of.

Furthermore, as is pointed out in the opinions of the Trial Court and Court of Appeals, the Civil Rights Act of 1957 has been sufficiently interpreted by the Courts to make it clear that the remedies contemplated by the Civil Rights Act are against "persons" and not against "States." See the cases cited in the Opinions of the lower courts, App. A and B, pages 28 and 60 of the Petition. The courts have already adjudicated the question of whether the Civil Rights Act authorizes suits against individual persons only, or **the source of their authority as well.** Indeed, this Honorable Court has already denied certiorari of a case presenting this identical question. **Handy Cafe, Inc. v. Justices of the Superior Court, et. al.** (1st Cir. 1957), 248 F. 2d. 485, Cert. Den. March 10, 1958, 356 U. S. 902.

Part IV of the Civil Rights Act of 1957 in paragraph (c) (P. L. 85-315, 71 Stat. 634, 42 U.S.C., Supp. V. (1971(c)) contains whatever authority the Attorney General possesses for instituting suit (the applicable provision is set out in the Petition beginning on the bottom of page 2). The word "person" means an individual person and does not inferentially include a State: A word is generally given the same meaning wherever it is found in a particular statute. Quoting the applicable portion of the statute, "whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive **any other person** of any right or privilege" respecting voting. A State of course cannot vote. Obviously, only an individual person possesses the right or privilege secured by subsection (a) or (b) of the section, which is the right of

an individual person to vote. Therefore, when the word "person" is used throughout the statute, it means, of necessity, an individual person, and cannot include a State.

Had it been intended that States could be made parties defendant under the Civil Rights Act, Congress would have worded Section 137, paragraph (d) differently. This is the paragraph conferring jurisdiction on the District Courts; it is well known that the Constitution of the United States in Article III, Section 2, gives the Supreme Court of the United States original jurisdiction (but not necessarily exclusive jurisdiction) in proceedings against States. The wording of this provision would be an attempt to oust the Supreme Court of its concurrent original jurisdiction if States could be made parties, as the Act provides for original jurisdiction in the District Courts only. Obviously, it was never intended that actions under the Civil Rights Act be brought directly against States.

Moreover, the Act speaks of "practices which would deprive any other person of any right or privilege . . .," and the "party aggrieved." The obvious purpose of paragraph (c) added by the 1957 Amendment was to authorize the Attorney General to institute a civil action for preventive relief for or in behalf of those persons threatened with a deprivation of their constitutional voting rights. To permit such an action directly against a State would be an attempted evasion of Article XI of the Constitution, which prohibits suits by citizens against the States.

It is apparent that the United States has no direct interest in spite of the general wording of the provision of paragraph (c) of Section 1971, under which this action is brought. In that connection, we refer the

Court to the testimony of Mr. Brownell in the Civil Rights hearings before Subcommittee No. 5 in February, 1957, at page 599, where this testimony appears:

> "The Chairman. But it says for the benefit of the real party in interest.
>
> Mr. Brownell. Or for the benefit of the real party in interest.
>
> The Chairman. Suppose the individual brought his own action. Could you intervene in that case under these provisions?
>
> Mr. Brownell. Yes . . . "

And on page 602.

> "Mr. Miller. Would there be any objection of the Department of the inclusion in the bill just a simple provision that where the Attorney General instituted the action in the name or for the benefit of the real party in interest, that it be with his consent?
>
> Mr. Brownell. I would think it might be misleading to do that, . . . "

To clinch the assertion that the real party in interest is not the United States, but certain citizens of the State of Alabama, please examine the wording of paragraph (d) of Section 1971, which purports to give this Court jurisdiction. There it clearly says that "the party aggrieved" need not exhaust his administrative or other remedies before suit is brought. Who is the party aggrieved? It must of necessity be these complaining witnesses. That being so, this is a suit by the

United States for and on behalf of certain individual citizens of the State of Alabama. Then there is no justifiable controversy or actual controversy between the parties. The United States has no proprietary interest or any real interest. The real party in interest are these citizens. For that reason a district court should not take jurisdiction of the matter as courts do not entertain suits that are moot as to the parties, or where the parties before the court have no direct interest. Judicial power of courts is always limited to actual controversies by adverse litigants.

Of more importance, it is clear that under the case of **Hans v. State of Louisiana,** 134 U. S. 842, 33 L. Ed. 177, a citizen of a State cannot sue his own State in a district court. Sometimes this is said to be controlled by the 11th Amendment, but at any rate it is settled law that district courts will not take jurisdiction of suits against a State by a citizen of that State. Therefore, it surely follows that, if the real parties in interest, that is "the aggrieved parties," are citizens of the State of Alabama, Congress did not intend that a State should be sued by a citizen through the United States, only a nominal party, as an evasive device to get around the guarantee of the 11th Amendment granting States immunity from such suits. This further substantiates the view that Congress never intended that a State should be made a party defendant under Civil Rights proceedings.

The public official who denies any other person his constitutional rights is acting personally and not as an agent for the State; particularly so in this instance where the Alabama law itself expressly forbids any discrimination between applicants for registration. The general law has been settled for years.

When State officials are acting in an unconstitutional or otherwise illegal manner, they are not regarded as acting for the State, either in its sovereign or governmental capacity, and they may be enjoined if the ordinary remedies of law are inadequate.

Such discrimination as complained of is ultra vires and beyond the scope of the official's authority, outside his jurisdiction and unlawful or without authority. Such action is personal; not State action. Quoting from the opinion of the Supreme Court of the United States in **Ex parte Young,** 209 U. S. 123, page 159:

> The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.' "

Not only is this precedent controlling as such, but

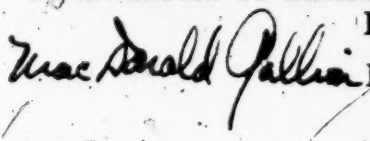
it was well known to Congress when the Civil Rights Act was first passed, and when it was amended in 1957. Had they intended to include States as parties to actions for preventive relief, they would have said so.

CONCLUSION

The correctness of opinions of the lower courts is self-evident. Furthermore the particular questions presented by this case do not reach the fundamental question of the constitutionality of the Civil Rights Act of 1957. The question presented is of limited scope and importance because of the peculiar circumstances of the instant case. The Petition seeks to have this Court legislate rather than review the issues of a litigated case.

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,



MacDONALD GALLION
Attorney General
State of Alabama
NICHOLAS S. HARE
Assistant Attorney General
State of Alabama
GORDON MADISON
Assistant Attorney General
State of Alabama
STATE CAPITOL
MONTGOMERY, ALABAMA
For All Defendants

L. K. (Snag) ANDREWS
Of Counsel for defendants
GRADY ROGERS and
E. P. LIVINGSTON
Union Springs, Alabama

CERTIFICATE OF SERVICE

I, MacDonald Gallion, Attorney for the Respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of October, 1959, I served copies of the foregoing brief in opposition on J. Lee Rankin, Solicitor General, United States of America, Washington, D. C., by placing a copy in a duly addressed envelope with first class postage prepaid in the United States Post Office at Montgomery, Alabama.

I further certify that this brief in opposition is presented in good faith and not for delay.

Mac Donald Gallion

MacDONALD GALLION
Attorney General
State of Alabama
Montgomery, Alabama